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No. 86-1136

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLEMENT J. PACYNA, PETITIONER

v.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 28 U.S.C. 2401(a), civil actions against the United States must be commenced "within six years after the right of action first accrues." The question presented is whether petitioner's cause of action seeking money damages for the Army's allegedly wrongful denial of a promotion first accrued at the latest upon his discharge from the Army in 1962, or approximately 20 years later when the Army Board for the Correction of Military Records rejected his request for correction of his records to reflect receipt of the promotion.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provisions involved 1

Statement 2

Argument 5

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Ballenger v. *Marsh*, 708 F.2d 349 (8th Cir. 1983) 6

Blassingame v. *Secretary of Navy*, 811 F.2d 65 (2d Cir. 1987) 8-9, 11

Bonen v. *United States*, 666 F.2d 536 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982) 8

Boruski v. *United States Government*, 493 F.2d 301 (2d Cir.), appeal dismissed, 419 U.S. 808 (1974), cert. denied, 421 U.S. 1013 (1975) 6

Branti v. *Finkel*, 445 U.S. 507 (1980) 6

Brundage v. *United States*, 504 F.2d 1382 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975) 8

Bruno v. *United States*, 556 F.2d 1104 (Ct. Cl. 1977) 8

Page

Cases—Continued:

Carter v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970) 11

Chappell v. *Wallace*, 462 U.S. 296 (1983) 8

Cook v. *Arentzen*, 582 F.2d 870 (4th Cir. 1978) 10

Cowhig v. *Marsh*, 693 F.2d 234 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983) 6

Crown Coat Front Co. v. *United States*, 386 U.S. 503 (1967) 7, 8

Denton v. *Schlesinger*, 605 F.2d 484 (9th Cir. 1979) 10

Dougherty v. *United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986) 9

Eureli v. *United States*, 566 F.2d 1146 (Ct. Cl. 1977) 8

Friedman v. *United States*, 310 F.2d 381 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963) 8

Geyen v. *Marsh*, 775 F.2d 1303 (5th Cir. 1985) 9

Heisig v. *United States*, 719 F.2d 1153 (Fed. Cir. 1983) 8

Keller v. *MSPB*, 679 F.2d 220 (11th Cir. 1982) 10

Page

Cases—Continued:

Maier v. *Orr*, 754 F.2d 973 (Fed. Cir. 1985) 10

Mathis v. *Laird*, 483 F.2d 943 (9th Cir. 1973) 10

Mathis v. *United States*, 391 F.2d 938 (Ct. Cl. 1968), aff'd, 421 F.2d 703 (1970) 6, 8

Matthews v. *United States*, 810 F.2d 109 (6th Cir. 1987) 10, 11

Nichols v. *Hughes*, 721 F.2d 657 (9th Cir. 1983) 6

Ramsey v. *United States*, 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979) 8

Smith v. *Marsh*, 787 F.2d 510 (10th Cir. 1986) 9

Soriano v. *United States*, 352 U.S. 270 (1957) 6-7, 8, 12

Tennessee ex rel. Leech v. *Dole*, 749 F.2d 331 (6th Cir. 1984), cert. denied, 472 U.S. 1018 (1985) 11

Tony & Susan Alamo Foundation v. *Secretary of Labor*, 471 U.S. 290 (1985) 6

Unexcelled Chemical Corp. v. *United States*, 345 U.S. 59 (1953) 5, 8

United States v. *Testan*, 424 U.S. 392 (1976) 10, 11, 12

Page

Cases—Continued:

Walters v. *Secretary of Defense*, 725 F.2d 107 (D.C. Cir. 1983) 6

Williams v. *Secretary of Navy*, 787 F.2d 552 (Fed. Cir. 1986) 10

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. (Supp. III) 702 ..... 8, 9, 10

Tucker Act:

28 U.S.C. 1346 4

28 U.S.C. 1346(a)(2) 4

10 U.S.C. 1552 2

10 U.S.C. 1552(b) 12

28 U.S.C. 1295(a)(2) 5, 9

28 U.S.C. 1361 ..... 4, 10

28 U.S.C. 1631 5

28 U.S.C. 2401 7

28 U.S.C. 2401(a) 1, 4, 5, 6, 7, 10, 11

28 U.S.C. 2501 7

Army Reg.:

Reg. 345-20, ¶ 15(e) (Mar. 9, 1956) 6

Reg. 345-20, ¶ 15(e)(3) (Mar. 9, 1951) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is reported at 809 F.2d 792 (Table). The opinion of the district court (Pet. App. B2-B8) is reported at 617 F.Supp. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 13, 1986. The petition for a writ of certiorari was filed on December 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2401(a) provides in pertinent part:

> Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

10 U.S.C. 1552 provides in pertinent part:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of Transportation may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

STATEMENT

1. Petitioner is a former Army master sergeant who voluntarily retired from active duty in 1962 after completing 20 years of military service. In August 1951, while serving as a counter-intelligence agent in the Army, petitioner applied for a promotion to the position of warrant officer in the Counter-Intelligence Corps (CIC). His superior officers, as well as a board of officers, recommended his selection, but the CIC ultimately declined to approve the appointment because petitioner did not meet the educational requirement for the position.[1] On January 22, 1952,

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[1]Under Army and CIC regulations in force at the time, an applicant for warrant officer was required to have completed two years of college or the equivalent (C.A. App. 149; see also *id.* at 144-145). Petitioner left

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petitioner's commanding officer informed him that his application had not been approved (Pet. App. D1). Petitioner took no action to challenge this decision at any time between 1952 and his voluntary retirement from the Army ten years later.

Seventeen years after his retirement, in February 1979, petitioner requested and obtained his military personnel records from the Department of the Army. The following year, on June 13, 1980, he applied to the Army Board for the Correction of Military Records (ABCMR or Board) seeking correction of his records to reflect a promotion to warrant officer retroactive to 1952. Pet. App. B3. The Board solicited and obtained an advisory opinion from the Judge Advocate General of the Army concerning petitioner's request (*ibid.*). That opinion, which recommended that petitioner's request be denied, was sent to petitioner for his comments (*id.* at B3-B4).

On February 25, 1981, following a thorough analysis of petitioner's application, his response to the Judge Advocate General's opinion, his military records and other materials, the Board concluded that petitioner had failed to furnish any material evidence indicating that the 1952 decision not to promote him to warrant officer was in any way unlawful or unjust. The Board also concluded that petitioner's 28-year delay in challenging that decision made it difficult to obtain evidence concerning his claim (Pet. App. B4). Accordingly, the Board denied petitioner's application and notified him of its decision. C.A. App. 40-43. Petitioner

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high school in the ninth grade and later obtained a high school equivalency certificate (*id.* at 119). Although an applicant could request a waiver of this requirement (*id.* at 149), petitioner's records do not indicate that he made such a request (see Pet. 10). Moreover, it was determined at the time that petitioner's record would not have justified the grant of an educational waiver in any event (C.A. App. 138; see Pet. 20).

sought reconsideration of the Board's decision on four separate occasions, and each of these requests was denied (*id.* at 202).

2. On February 23, 1983, petitioner commenced this action in the United States District Court for the Western District of New York. He alleged that the district court's jurisdiction was based on the Tucker Act, 28 U.S.C. 1346, and the mandamus statute, 28 U.S.C. 1361 (C.A. App. 2). He claimed that the Board had abused its discretion in denying his application and sought an order correcting his record to reflect a promotion to warrant officer in 1952. He also sought an award of back pay retroactive to 1952, including increased retirement pay (*id.* at 5; Pet. App. B4-B5). Petitioner waived any claim to money damages in excess of $10,000 in order to preserve jurisdiction in the district court. Pet. App. B8; see 28 U.S.C. 1346(a)(2) (granting the district courts jurisdiction, concurrent with the Claims Court, of non-tort claims against the United States "not exceeding $10,000 in amount").

The district court granted the government's motion for summary judgment and dismissed petitioner's complaint (Pet. App. B1-B8). It held that petitioner's claim had accrued, at the latest, upon his retirement from the Army in 1962, and hence that his claim was barred by 28 U.S.C. 2401(a), which establishes a six-year statute of limitations for civil actions against the United States (Pet. App. B5-B7). The court rejected petitioner's argument that his money claim had been "revived" by the ABCMR's 1982 decision, pointing out that acceptance of this argument "would permit a plaintiff * * * to avoid the jurisdictional bar every time he submitted an application which was considered by the Board" (*id.* at B7). The court emphasized that petitioner was not seeking "to correct a discharge from dishonorable to honorable," "to expunge the judgment of a court martial," or otherwise merely to clear his name, but

rather was seeking money damages (*id.* at B6). "[I]n cases like the present one where the relief sought is money," the court concluded, "the statute of limitations is a bar if the case is untimely filed" (*id.* at B7).

The United States Court of Appeals for the Second Circuit affirmed in an unpublished judgment order. This Court granted certiorari, vacated the judgment, and remanded the case to the Second Circuit with directions to transfer it to the Federal Circuit pursuant to 28 U.S.C. 1631. *Pacyna* v. *Marsh*, No. 84-1706 (Jan. 21, 1986). The Court based its order on 28 U.S.C. 1295(a)(2), which grants the Federal Circuit exclusive jurisdiction over appeals of suits brought under the Tucker Act. See 84-1706 U.S. Br. 4-5.

The Federal Circuit unanimously affirmed the district court in an unpublished per curiam opinion (Pet. App. A2-A4). It held that petitioner's claim had accrued in 1952 when he was denied appointment as a warrant officer and, therefore, that his complaint was barred by the six-year statute of limitations in 28 U.S.C. 2401(a) (Pet. App. A3). The court further held that resort to a Correction Board does not revive a claim for money damages on which the limitations period has already run (*id.* at A3-A4).

ARGUMENT

The decision of the Federal Circuit is correct and accords with an unbroken line of opinions spanning 25 years. It does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner challenges a 35-year old decision by the Army denying his application for promotion to the position of warrant officer. As this Court has recognized, a plaintiff's cause of action generally accrues for statute-of-limitations purposes "when there is a breach of duty owed the plaintiff." *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953). Petitioner was advised in January 1952

that he would not be promoted to the position of warrant officer; his cause of action therefore accrued at that time or, at the latest, upon his discharge from the Army in 1962. See *Walters* v. *Secretary of Defense*, 725 F.2d 107, 114-115 (D.C.Cir. 1983); *Nichols* v. *Hughes*, 721 F.2d. 657, 659-660 (9th Cir. 1983); *Ballenger* v. *Marsh*, 708 F.2d 349, 350 (8th Cir. 1983); *Cowhig* v. *Marsh*, 693 F.2d 234, 235 (1st Cir. 1982), cert. denied, 460 U.S. 1092 (1983); *Boruski* v. *United States Government*, 493 F.2d 301, 304 n.5 (2d Cir.) (per curiam), appeal dismissed, 419 U.S. 808 (1974), cert. denied, 421 U.S. 1013 (1975); *Mathis* v. *United States*, 391 F.2d 938, 938-939 (1968) (per curiam), aff'd on reh'g, 421 F.2d 703 (Ct. Cl. 1970). Since an action against the United States must be filed "within six years after the right of action first accrues" (28 U.S.C. 2401(a)), and since petitioner plainly failed to satisfy this requirement, the courts below correctly concluded that petitioner's action was time-barred.[2]

2. Petitioner asserts (Pet. 26-27) that the statute of limitations did not begin to run until the Correction Board issued its decision in 1981. However, in *Soriano* v. *United*

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[2]Petitioner contends (Pet. 9-11) that his efforts to obtain information about the reasons he was not promoted were thwarted by his superiors and that he was not able to ascertain the facts until he obtained copies of documents from his personnel file through the Freedom of Information Act in 1979. The district court found (Pet. App. B6) that there was no reason petitioner could not have reviewed his personnel records prior to 1979. This factual finding, which was implicitly affirmed by the court of appeals, does not merit review in this Court. *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290, 299 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980). In any event, petitioner's contention is baseless. Army regulations in force during the period in question enabled servicemen to review their own personnel files upon request. See Army Reg. 345-20, ¶ 15(e)(3) (Mar. 9, 1951); Army Reg. 345-20, ¶ 15(e) (Mar. 9, 1956). Furthermore, the Freedom of Information Act was passed in 1966. Thus, even if that statute was the only means available to petitioner to obtain his military records, there is no reason why he could not have done so 13 years earlier than he did.

States, 352 U.S. 270 (1957), this Court rejected a substantially similar argument, holding that a money claim that is ripe for judicial resolution must be filed " 'within six years after such claim *first* accrues,' " and that the six-year statute cannot be extended by the pursuit of various administrative remedies. 352 U.S. at 273 (emphasis added) (quoting 28 U.S.C. 2501). Construing 28 U.S.C. 2501, a limitations provision governing actions in the Claims Court which is almost identical to Section 2401, the Court concluded that "to say that the exhaustion of administrative remedies in such case is a prerequisite to the jurisdiction of the Court of Claims would but engraft [another] disability upon the statute and thus frustrate the purpose of Congress. Furthermore, it would be a limitless extension of the period of limitation that Congress expressly provided for the prosecution of claims against the Government in the Court of Claims. This we cannot do." 352 U.S. at 275 (original quotation marks omitted).

Petitioner's argument fails for the same reason. Under his theory, a person seeking to challenge a discharge or nonpromotion could revive a stale claim for money damages by the simple expedient of applying first to the Correction Board, and then, following a denial of his claim by the Board, bringing a Tucker Act suit. In that way, the statute of limitations could effectively be eliminated as a bar to ancient claims for money damages.[3] Over the past 25 years,

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[3]In *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 511 (1967), this Court held that, in a Tucker Act suit brought on a contract which contained a provision mandating equitable administrative adjustment for any changes in the contract, the cause of action did not accrue within the meaning of 28 U.S.C. 2401(a) until "the completion of the administrative proceedings contemplated and required by the provisions of the contract." In *Crown Coat*, however, "the contractor's claim was subject only to administrative, not judicial, determination in the first instance, with the right to resort to the courts only upon the making of that administrative determination" (386 U.S. at 511-512). The Court

the Federal Circuit and its predecessor, the Court of Claims, have repeatedly rejected this precise argument, and this Court has consistently declined to review those decisions. See *Bonen* v. *United States*, 666 F.2d 536, 539 (Ct. Cl. 1981), cert. denied, 456 U.S. 991 (1982); *Ramsey* v. *United States*, 215 Ct. Cl. 1042 (1978), cert. denied, 439 U.S. 1068 (1979); *Bruno* v. *United States*, 556 F.2d 1104, 1106 (Ct. Cl. 1977); *Brundage* v. *United States*, 504 F.2d 1382, 1385 (Ct. Cl. 1974), cert. denied, 421 U.S. 998 (1975); *Mathis* v. *United States, supra; Friedman* v. *United States*, 310 F.2d 381, 396-403 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). Petitioner's contention that there is a conflict among the courts of appeals on this issue is simply incorrect. None of the appellate decisions cited by petitioner (Pet. 29) is even remotely on point.

3. Petitioner next argues (Pet. 26) that he is entitled to judicial review of the Correction Board decision itself under the Administrative Procedure Act (APA), 5 U.S.C. (Supp. III) 702. As this Court has observed, "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Four circuits in fact have recently held that Board decisions are independently reviewable within six years even if the statute of limitations has passed on the underlying action considered by the Board. *Blassingame* v. *Secretary of Navy*, 811

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expressly distinguished *Soriano* v. *United States, supra*, and *Unexcelled Chemical Corp.* v. *United States, supra*, on the grounds that in the latter two cases the administrative action was not a prerequisite to suit (386 U.S. at 519). Similarly, the Federal Circuit does not require a plaintiff to apply to the Correction Board before seeking money damages in court under the Tucker Act on a claim of wrongful discharge or nonpromotion. See, *e.g.*, *Heisig* v. *United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983); *Eurell* v. *United States*, 566 F.2d 1146, 1147-1148 (Ct. Cl. 1977). Thus, petitioner's cause of action for money damages properly accrued at the time of the allegedly wrongful nonpromotion.

F.2d 65 (2d Cir. 1987); *Smith* v. *Marsh*, 787 F.2d 510 (10th Cir. 1986); *Geyen* v. *Marsh*, 775 F.2d 1303 (5th Cir. 1985); *Dougherty* v. *United States Navy Bd. for Correction of Naval Records*, 784 F.2d 499 (3d Cir. 1986). None of these cases, however, involved a claim for money damages under the Tucker Act. Indeed, none of these cases could possibly have involved a Tucker Act claim, since, if they had involved such a claim, the district court decisions would have been appealable, under 28 U.S.C. 1295(a)(2), to the Federal Circuit rather than to the regional courts of appeals. Because petitioner brought the instant action to recover money damages under the Tucker Act, the cases just cited are distinguishable from this one. See, *e.g.*, *Blassingame*, 811 F.2d at 68 (noting that the plaintiff "relinquished his demand for monetary damages" and that he sought "only the equitable relief of an upgrade of his discharge and no money damages"); *Dougherty*, 784 F.2d at 502 (noting that "[t]he instant case is not a pay case" and that "[t]he equitable considerations governing a corrective action are quite different than those governing a monetary action").

The reason for the distinction between cases involving monetary and nonmonetary claims lies in the judicial review provision of the Administrative Procedure Act, 5 U.S.C. (Supp. III) 702. See *Dougherty*, 784 F.2d at 502 n.10. That provision, upon which petitioner relies (Pet. 16, 18, 26-27), generally provides a cause of action for judicial review of final agency action. Section 702 explicitly states, however, that an action may be brought thereunder only if it is an action "seeking relief other than money damages." Because Section 702 does not waive sovereign immunity for actions seeking money damages, petitioner's cause of action for money damages necessarily accrued at the time of his

allegedly wrongful nonpromotion in 1952, or, at the latest, upon his retirement from the Army in 1962 (Pet. App. B6). Because petitioner failed to bring his suit within six years of either of those dates, his action is barred by 28 U.S.C. 2401(a).

This distinction between monetary and nonmonetary claims surely comports with common sense. Petitioner did not seek equitable relief in an effort to "clear his name," but sought money damages going back to 1952. As this Court noted in *United States* v. *Testan*, 424 U.S. 392, 403 (1976), "[t]here is a difference between prospective reclassification, on the one hand, and retroactive reclassification resulting in money damages, on the other." The APA cannot revive petitioner's stale claim for money damages.

4. Although petitioner explicitly predicated his complaint on the Tucker Act (C.A. App. 2), he contends (Pet. 31-32) that he is seeking not only money damages, but also a writ of mandamus under 28 U.S.C. 1361 to review the Board's allegedly wrongful failure to "correct" his record to reflect the promotion. He accordingly argues that judicial review would be appropriate. But it is well settled that a plaintiff with an admitted monetary objective cannot evade the Tucker Act simply by citing other jurisdictional provisions, such as 28 U.S.C. 1361. See, *e.g.*, *Matthews* v. *United States*, 810 F.2d 109, 113 (6th Cir. 1987); *Keller* v. *MSPB*, 679 F.2d 220 (11th Cir. 1982) (per curiam); *Williams* v. *Secretary of Navy*, 787 F.2d 552, 557-558 (Fed. Cir. 1986); *Maier* v. *Orr*, 754 F.2d 973, 982 (Fed. Cir. 1985); *Denton* v. *Schlesinger*, 605 F.2d 484, 486-487 (9th Cir. 1979); *Cook* v. *Arentzen*, 582 F.2d 870, 878 (4th Cir. 1978); *Mathis* v. *Laird*, 483 F.2d 943 (9th Cir. 1973) (per curiam);

Carter v. *Seamans*, 411 F.2d 767, 771 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970). Petitioner specifically sought back pay and increased retirement benefits stemming from his allegedly wrongful nonpromotion in 1952. He cannot obtain judicial consideration of that claim indirectly in the guise of an action to compel the Correction Board to grant the very monetary relief that he is barred by the statute of limitations from seeking directly. See *United States* v. *Testan*, 424 U.S. at 404.

Even where a plaintiff has not explicitly predicated jurisdiction on the Tucker Act, a self-styled claim for equitable relief may be time-barred by Section 2401(a) if the cause of action accrued more than six years earlier and the relief requested would be tantamount to a monetary award. As the Sixth Circuit has stated (*Tennessee ex rel. Leech* v. *Dole*, 749 F.2d 331, 336 (1984), cert. denied, 472 U.S. 1018 (1985)), "a claimant may not avoid the exclusive jurisdiction of the Court of Claims merely by framing a complaint to seek nonmonetary relief when the result would be the equivalent of obtaining money damages." See also *Matthews* v. *United States*, 810 F.2d at 113. In circumstances where it is unclear whether a plaintiff purporting to seek only equitable relief is actually bringing a disguised Tucker Act claim, the ambiguity may be resolved by requiring him explicitly to waive any claim to money damages. See, *e.g.*, *Blassingame*, 811 F.2d at 68. As we have noted, there was no such ambiguity in the instant case, since petitioner expressly based jurisdiction on the Tucker Act and waived money damages only in excess of $10,000 (Pet. App. B8).[4]

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[4]Where a plaintiff has waived all monetary claims in order to secure jurisdiction in a regional court of appeals, of course, he cannot subsequently reverse himself and seek money damages in the district court or in the Claims Court. Thus, even if a plaintiff were successful in getting the regional circuit to overturn the action of the Correction Board, he could not use that judgment as the basis for a new cause of action for

In sum, it is one thing for a plaintiff to seek review of a Correction Board decision to try to correct his military record or clear his name long after the events in question occurred. Congress has provided a mechanism by which the Correction Board may waive its own statute of limitations where it is "in the interests of justice" to do so (10 U.S.C. 1552(b)). But it is quite another thing for that plaintiff to sue for monetary damages, whether directly or indirectly, after the statute of limitations has run on his claim. *United States* v. *Testan*, 424 U.S. at 403. Congress has not provided a waiver provision for such suits, and "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. at 276.

5. A final factor counseling against a grant of certiorari in this case is the insubstantial nature of petitioner's underlying claim. He has never articulated any reason why he was entitled to a promotion in 1952 despite his lack of educational qualifications for the position of warrant officer. The Correction Board correctly noted that petitioner had "failed to submit sufficient relevant evidence to demonstrate the existence of probable material error or injustice" in the decision not to promote him. C.A. App. 43. As the district court pointed out, moreover, "[b]ecause of [petitioner's] 28-year delay in challenging the decision made in 1952, only limited documentation is [now] available" (Pet.

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money damages if the allegedly wrongful discharge or nonpromotion occurred more than six years previously. First, he would be bound by his prior waiver of monetary relief. Second, APA review of a Correction Board decision would not change the fact that any suit for monetary damages under the Tucker Act accrues on the date of the underlying discharge or nonpromotion. A suit for monetary damages based on a discharge or nonpromotion more than six years old would therefore be barred regardless of any subsequent decision granting the plaintiff an upgraded discharge or similar equitable relief.

App. B4). Thus, whatever action this Court took on the statute-of-limitations issue, the end result of this litigation would be the same.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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